

**YONG SENG CONSTRUCTION
(SUING AS A FIRM)**

v.

CELAJU SDN. BHD.

HIGH COURT, SEREMBAN
TUAN T. SELVENTHIRANATHAN JC
[CIVIL SUIT NO. 22-143-1990]
8 SEPTEMBER 1993

PRACTICE & PROCEDURE : Application to amend defence and counterclaim - Application made after plaintiff applied for summary judgment - Amendments sought to include plea of fraud - Whether application to amend was bona fide - Whether the application was a tactical manoeuvre intended to delay the proceedings.

The defendant appealed against the decision of the learned senior assistant registrar dismissing its application to amend the defence and counterclaim to plead the perpetration of a fraud. The defendant sought to allege that a letter written by its former manager to the plaintiff, acknowledging the sum claimed, was written without authorisation on an old letterhead of the defendant.

Held:

The facts giving rise to the plea of fraud were known to the defendant when filing the defence and counterclaim, and the raising of the question of fraud only when the plaintiff sought to enter summary judgment under O. 14 of the Rules of the High Court 1980 shows that the application to amend was not made *bona fide* and was merely a tactical manoeuvre intended to delay the proceedings.

[Defendant's application to amend the defence dismissed with costs].

Case referred to:

Ismail bin Ibrahim & Ors. v. Sun Poh Development & Anor. [1988] 2 CLJ 632/[1988] 3 MLJ 348 (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 14, r. 3

For the plaintiff- S. Seralan; M/s. Mahadevi Ganeshmurugan & Co.

For the defendant-Chee Mun Siew; M/s. Chin Choong Sang & Co.

JUDGMENT

T. Selenthiranathan JC:

The defendant appealed against the decision of the learned senior assistant registrar dismissing its application to amend the defence and counterclaim. The application was filed on 18 December 1990 to amend the defence to allege the perpetration of a fraud upon the defendant by the plaintiff and a former manager of the defendant who had admitted in a letter dated 2 March 1990 that the defendant owed the plaintiff the sum of RM507,209 claimed. It was sought to allege that that letter was written without authorisation on an old letterhead of the defendant.

The plaintiff claimed the sum of RM507,209 ("the balance sum") from the defendant, being the balance due for the construction of a factory building carried out for the defendant between July 1988 and January 1989. The total cost of construction was RM656,635 of which the defendant had settled RM149,426 leaving the balance sum. The writ of summons and statement of claim [enclosure (1)] was filed on 27 September 1990 and served. The defendant entered appearance on 5 October 1990. On 16 October 1990, the defendant made an application [enclosure (3)] for all proceedings in the action to be stayed pending referral of the matter to arbitration, which was fixed for hearing on 23 November 1990. However, the defendant withdrew the application on 6 November 1990.

The defendant then filed its defence and counterclaim [enclosure (5)] on 12 November 1990 and counter claimed for RM3,945,600 as special damages, and for general damages and costs. It alleged that as a result of the late completion of the building, the defendant's multi-million ringgit contract with a third party, Protima Sdn. Bhd. ("Protima"), to supply dry rubber concentrates, entered into on 14 September 1988, was terminated by Protima in December 1988 because of the defendant's inability to supply the same in November 1988. The counterclaim was in respect of the profits the defendant would have made under the contract with Protima.

The defendant alleged that the plaintiff had been informed of the contract with Protima and had undertaken to complete the building by the

end of September 1988, which it had failed to do. As a result of the delay by the plaintiff in completing the construction of the building, the defendant was only able to commence its own operations in January 1989. The defendant also claimed that the plaintiff did not carry out the works pertaining to the building in accordance with the agreement entered into between them. The works were of sub-standard quality and incomplete, and the plaintiff also claimed for works performed by others.

On 28 November 1990, the plaintiff filed its reply to the defence and defence to the counterclaim [*vide* enclosure (6)]. It denied the allegations in the defence and counterclaim and put the defendant to strict proof thereof. The plaintiff pleaded no knowledge of any purported agreement between the defendant and Protima for the supply of dry rubber concentrates and denied that the defendant had informed it or given intimation thereof to it at any time. The plaintiff averred that it commenced work on the factory building in August 1988 and completed it in January 1989 to the satisfaction of the defendant. The defendant had then gone into occupation of the building in January 1989 and commenced business. The plaintiff contended that the defendant was in serious financial difficulties and raised the purported agreement between it and Protima as an after-thought to postpone payment of the balance sum owing to the plaintiff, which the defendant had agreed to pay. The defendant was estopped from denying owing the balance sum which it had undertaken to pay by its letter dated 2 March 1990. The purported losses suffered by the defendant owing to the termination of its contract with Protima was not within the knowledge of the plaintiff and was vehemently denied. The plaintiff was not a party to the contract between the defendant and Protima, which had been entered into by the defendant unknown to the plaintiff. The counterclaim was unfounded, vexatious, scandalous, frivolous and an abuse of the process of the Court. The plaintiff averred that it would make the necessary application to strike out the defence and counterclaim.

On 28 November 1990 also, the plaintiff filed an application [enclosure (7)] for leave to enter final judgment against the defendant under O. 14, r. 3 of the Rules of the High Court 1980 ("the Rules"), which application was fixed for hearing on 4 January 1991. It was supported by the affidavit of Yu Kim Ke, the manager of the

- a plaintiff, which set out in detail the building works carried out and exhibited the specific relevant invoices for a total amount of RM656,635. However, the defendant had so far paid a sum of RM149,426, leaving the balance sum. It was averred that at the commencement of the action the defendant was justly and truly indebted to the plaintiff in the said sum, which was still due and owing, and that there was no defence to the action. The counterclaim was an afterthought intended to delay the proceedings before the Court and was without merit. Also exhibited to the affidavit was invoice 0305 dated 9 January 1989 which acknowledged receipt of RM70,000 and requested that the balance be settled soon (exhibit "YKK-2"). The invoices were all issued in January 1989 which was the month in which the plaintiff claimed it completed the building works and when the defendant went into occupation of the factory. A letter from the plaintiff dated 15 February 1990 (exhibit "YKK-5") reminded the defendant of the invoices sent for a total sum of RM656,635 owing, which was the cost of construction of the defendant's factory building. The letter acknowledged receipt of a sum of RM149,426 and requested settlement of the outstanding balance sum.
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- f This letter, according to the plaintiff, was replied to by the defendant (exhibit "YKK-6") on 2 March 1990. It was signed by the manager of the defendant, one Fauzi Abdullah. The reply thanked the plaintiff for its letter of 15 February 1990 "sent to us personally by hand". The reply acknowledged owing the plaintiff the balance sum "as confirmed from our accounts but requested that the defendant be allowed to make staggered payments as it was in financial difficulties. On 22 June 1990 the plaintiff sent the defendant a reminder by registered post (exhibit "YKK-7") requesting payment of the long-overdue balance sum for the construction of the defendant's factory building, which had been completed more than eighteen months earlier. The reminder requested immediate settlement and also asked the defendant to let the plaintiff know as to when it would settle the whole amount due.
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- i On 12 August 1990 the plaintiff's solicitors sent the defendant an AR registered letter (exhibit "YKK-8") giving notice of impending legal action unless the outstanding balance sum was paid within fourteen days.

On 18 December 1990 the defendant applied by summons in chambers [*vide* enclosure (9)] for leave to amend its defence and counterclaim on the ground that it had no knowledge of the letter of 2 March 1990 written by its manager which acknowledged owing the plaintiff the balance sum. The affidavit in support of this application claimed that the letter was never authorised by the board of directors of the defendant to be written, that, it was a subsequent concoction between the plaintiff and the former manager of the defendant to perpetrate a fraud on the defendant, and that the defence of fraud had not been pleaded in the defence as the defendant was totally unaware of this act of cheating committed by its former manager together with the plaintiff.

The defendant then filed two lengthy affidavits on 2 January 1991 [enclosures (12) and (13)] which substantially reiterated its defence and counterclaim and the affidavit in support of its application to amend the former. In support of its allegation of fraud, the defendant exhibited what it claimed was its new letter-head which should have been used by its manager to write the letter of 2 March 1990 (exhibit YKK-6) to acknowledge owing the balance sum to the plaintiff if he was indeed authorised to do so. The defendant also exhibited copies of letters signed by its manager pertaining to various payments made by the defendant.

However, these letters clearly show that the manager was responsible for the accounts of the defendant before and after he wrote the ostensibly unauthorised acknowledgment of debt. These letters further bear out the plaintiff's allegation that the defendant was facing financial difficulties as many of the payments made by these letters included interest for late payment or penantly interest. In fact, the impugned letter acknowledging the debt confirmed categorically:

Please be informed we don't deny owing you the sum of RM507,209 as **confirmed from our account** but however please take serious notice that we are in financial difficulties and the company is not progressing well at the moment on its sales. However we are very speculative (*sic*) that the sale of our products would picking up very soon and the company would be in a position to settle your debts.

Therefore we would sincerely trust that you will permit us to do staggered payments through instalments when the business picks

up, and we would definitely pay you without default.

It is only a matter of time and we are being hard-pressed at the moment and therefore kindly bear with us towards payment.

It is interesting to note that on the very day the defendant's manager is said to have written the unauthorised letter, i.e. on 2 March 1990, he wrote another letter to OCBC Finance Berhad in Kuala Lumpur enclosing a cheque for RM5,000 towards payment of the defendant's loan account and replacing a cheque dated 23 January 1990 "which is reported to be lost/misplaced. We have advised OCBC Seremban not to honour the last cheque" [exhibit "B-4" to defendant's affidavit enclosure (13)].

If indeed the defendant's manager intended to perpetrate a fraud on the defendant in collusion with the plaintiff, it would have been very easy for him to have used the new letterhead of the defendant to write the impugned letter to the plaintiff as it is clear from the defendant's own exhibits that the manager was authorised to handle the defendant's accounts and use its letterhead in correspondence. Being the manager he would have known if the old letterhead had ceased to be used and it would be totally inexplicable for him to use the old letterhead when he had access to the new.

Furthermore, the accounts of the defendant made up to 30 June 1990 and exhibited to the plaintiff's affidavit in reply [exhibit "A-1" in enclosure (14)] showed the defendant owing its trade creditors a sum of RM1,137,781. The plaintiff claimed that a detailed breakdown of this sum in the books of the defendant would show the plaintiff as one of the trade creditors and that the defendant owed the plaintiff the balance sum of RM507,209. However, the books were in the possession of the defendant.

On a full consideration of the copious affidavits filed (the contents of some of which were unnecessarily lengthy and repetitive), I dismissed the appeal of the defendant against the decision of the learned senior assistant registrar with costs. The allegation of a fraud being perpetrated on the defendant through collusion between the plaintiff and the defendant's former manager was only raised on 18 December 1990 whereas by paragraph 6 of the statement of claim itself the plaintiff averred that it "had made several repeated demands orally and in writing and the

defendant had so far not paid the sum of RM507,209 **stating that the defendant is in serious financial difficulties and the company is not progressing well at the moment on its sales**".
(emphasis added).

Again in its reply to the defence and the defence to the counterclaim, the plaintiff stated in paragraph 6 thereof that:

... the defendant had agreed to pay and since the defendant was in serious financial difficulties and the defendant was not progressing well on its sales and intended to postpone payment on the balance sum of RM507,209 which sum the defendant agreed to pay. The defendant is now estopped from denying payment on the sum they have undertaken to pay by their letter dated 2 March 1990.

Yet the defendant contended that it only became aware of the letter of 2 March 1990 after the plaintiff filed its application for summary judgment under O. 14 of the Rules and exhibited that letter to its affidavit in support of the application. However, the statement of claim itself repeated the contents of that letter in paragraph 6 and the defendant did not deny having so stated in its defence.

In my view, therefore, the attempt by the defendant to amend the defence to include fraud was **not made bona fide and was intended to delay the proceedings** (emphasis added). To my mind, this case falls very much within the principles enunciated by Mr Justice Mohamed Dzaiddin (as he then was) in, *Ismail bin Ibrahim & Ors. v. Sun Poh Development & Anor.* [1988] 3 MLJ 348. The facts giving rise to the plea of fraud were known to the defendant when filing the defence and counterclaim, and the raising of the question of fraud only when the plaintiff sought to enter summary judgment under O. 14 of the Rules was a tactical manoeuvre intended to delay and therefore the application of the defendant to amend the defence and counterclaim to include the defence of fraud was dismissed with costs.

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